Chapter X specifically provides that where no answer is filed by a debtor to a petition against it, or if the answer filed does not controvert any material allegation of the petition, the judge may enter an order approving the petition if satisfied that it complies with the requirements of Chapter X and has been filed in good faith. Section 142 (11 U. S. C. 542). Where an answer is filed by the debtor which controverts any material allegations of the petition, it is provided that the judge shall determine the issues presented by the pleadings and enter an order approving or dismissing the petition. Section 143 (11 U. S. C. 543). The type of answer here filed, which consented to and joined in the request for relief while controverting an allegation which but for the consent would have been material, has been filed occasionally in the past for the purpose of not conceding allegations which indicate liability on the part of the debtor's directors, but we are aware of no other instance where it was contended that denials in such an answer created an issue triable in connection with approval of the petition.

In any event, since the debtor joined in the petition and since, when relief is sought by a debtor, there is no need to allege an act of bankruptcy, the court below properly treated as immaterial the allegation of the creditors' petition as to preferential transfers while insolvent (Pet. 36). Any other result would have been illogical

and wholly unrealistic, particularly since, as pointed out by the court below (Pet. App. 37), a debtor's written admission of inability to pay its debts and willingness to be adjudged bankrupt constitutes an act of bankruptcy uner Section 3 (a) (6) of the Act (11 U. S. C. 21 (a) (6)); hence, had the petition been dismissed, the petitioning creditors would merely have had to file a new petition alleging the debtor's answer as an act of bankruptcy.

As pointed out by the court below, its determination was not inconsistent with its previous decision in *Moore* v. *Linahan,* 117 F. 2d 140, certiorari denied, 314 U. S. 628. In that case the question was whether an answer consenting to an involuntary petition should be treated as a voluntary petition *for the purpose of withdrawal of the answer* under Section 59 (g) of the Act (11 U. S. C. 95 (g)) and not, as here, for the purpose of eliminating proof of an act of bankruptcy. In the instant case the court below held that its determination was not "that the debtor's answer becomes a voluntary petition, but merely that the filing of such an answer makes it unnecessary for the petitioner to allege or prove any of the acts required by Section 131, 11 U. S. C. A. § 531" (Pet. App. 37). In fact, *Moore* v. *Linahan* supports the conclusion of the court below in that Judge Learned Hand there indicated that where the debtor "chooses to pray for the approval of an involuntary petition" it is doubtful that "either

creditor, 'indenture trustee' or stockholder can press to decision the added allegation required by Section 131; that is, can vicariously assume the debtor's defense as to something against which it does not want protection" (117 F. 2d at 143). This view would seem to apply *a fortiori* to the present case.

Other authorities cited by petitioner are irrelevant. We do not dispute the necessity either of pleading jurisdictional facts or of proving them when challenged, and we agree that where there is no jurisdiction over the subject matter, as in diversity cases where the requirements of diversity are not met or in cases where the amount involved is insufficient to meet the jurisdictional minimum, jurisdiction over the subject matter cannot be conferred by consent. We submit, however, that these principles, for which petitioner's authorities stand, have no application here. As the courts below held, petitioner's answer was not a mere "consent" to a nonexistent jurisdiction; the answer, even apart from the fact that it was in itself an act of bankruptcy (*supra*, p. 11), supplied the factual basis on which Congress could and did provide for jurisdiction under Chapter X.

2. Petitioner's remaining contention (Pet. 29–31)—that it had an absolute right to file an amended answer after the District Court had approved the Chapter X proceeding on the allegations of the original answer—is neither sub-

stantial nor relevant to the orders brought for review to the Court of Appeals and this Court. The only order to which this contention could conceivably be addressed is the order (pp. 7–8, *supra*) denying petitioner's motion for leave to withdraw both its original answer and its amended answer and to file an "answer de novo." We believe, of course, that the observations of the court below on the tardy and unauthorized effort to file an amended answer are clearly correct (Pet. App. 38). But even if this point were doubtful, it could not help the petitioner. First of all, as the court below noted (Pet. App. 39), the amended answer could have made no difference because in it "the debtor reiterated its consent to reorganization and its inability to meet its debts as they matured." Secondly, and decisively, the propriety of the attempt to file the amended answer was not necessary to decision in the Court of Appeals and is not here. All that was appealed was the order denying leave to file a much later "answer de novo"—an order which is not even questioned here and was plainly justified by the finding that the motion seeking such leave was not filed in good faith and was without merit (*supra*, p. 8).

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.

THOMAS G. MEEKER,
General Counsel,

DAVID FERBER,
Special Counsel,
Securities and Exchange Commission.

JUNE 1956.

U. S. GOVERNMENT PRINTING OFFICE: 1956

Office - Supreme Court, U.S.
JUN 1956

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 924

A Proceeding for Reorganization Under Chapter X of the Bankruptcy Act
No. 90460

In the Matter

of

HUDSON & MANHATTAN RAILROAD COMPANY,

Debtor-Petitioner.

WILLIAM J. HARDING, JR., IRVING I. SCHNUR and SHIRLEY REITER,

Petitioning Creditors, Respondents.

PETITIONER'S REPLY BRIEF

JULIUS HALLHEIMER,
LOUIS A. VALENTE,
Counsel for Petitioner.

LOUIS A. VALENTE,
JULIUS HALLHEIMER,
OTIS MARK WATERS,
STANLEY NITZBURG,
of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955
No. 924

A Proceeding for Reorganization Under Chapter X
of the Bankruptcy Act
No. 90460

In the Matter
of
HUDSON & MANHATTAN RAILROAD COMPANY,
Debtor-Petitioner.

WILLIAM J. HARDING, JR., IRVING I. SCHNUR
and SHIRLEY REITER,
Petitioning Creditors, Respondents.

PETITIONER'S REPLY BRIEF

Respondents (Petitioning Creditors) on p. 4 of their opposing brief state:

> "The jurisdiction of the District Court to reorganize the Debtor under Chapter X was finally and conclusively established by the order denying the motion to dismiss and by the order dismissing the Debtor's petition for reorganization under Section 77."

The whole body of federal law is uniform in requiring that federal jurisdiction must affirmatively appear in the

record. The record will be searched in vain for the existence of the facts upon which federal jurisdiction here is claimed to depend, namely, that the debtor committed acts of bankruptcy by making preferential payments while insolvent. Those facts are merely averred, and they stand denied and unproved of record.

Respondents' suggestion that the question is *res judicata* and can therefore no longer be raised has no merit. The denial of a motion to dismiss [1] for want of jurisdiction is not and never has been a bar to thereafter raising the same issue on the merits in the answer, and the expiration of the time to appeal from the adverse decision of the motion does not affect the matter.

> "The new Rules have made no change in the law concerning the effect of overruling a motion based on jurisdiction, venue or process. The party simply answers over, preserving his objection, and in the event of an adverse judgment, may raise the point on appeal." 16 Cal. State Bar Journal 153.
>
> "Rule 12(h) simply means that you can raise certain defenses mentioned even though raised before in an earlier stage of the pleadings. If you start with a motion—which you are not bound to make at all—and raise the first five points in 12(b), then raise the sixth ground and are overruled, you could put the sixth in your answer when it is filed, and then make a motion for judgment on the pleadings, and get another hearing on it." 4 John Marshall L. Q. 291.

The respondents also say (p. 4, opposing brief): that the "order dismissing the Debtor's petition for reorganiza-

---

[1] The debtor's motion to dismiss was decided on affidavits, not on proof.

> "* * * allegations are not proof and though a motion under Rule 12 may dispose quickly and properly of many such suits, such a motion cannot take the place of proof" (*Cold Metal Process Co.* v. *United Eng. Co.* (C. A. 3, 1950), 197 F. 2d 217, 221).

tion under Section 77 * * * is a final adjudication of the Section 77 issue, and is not subject to collateral attack. (Stoll v. Gottlieb, 305 U. S. 165.)"

This is a specious suggestion. We do not challenge the jurisdiction of the Court to act in the Chapter VIII proceeding. We challenge the jurisdiction of the Court to act in *this* proceeding, and that is not a collateral attack, but a frontal assault, a direct jurisdictional attack in the same Chapter X proceeding between the same parties, in the same Court and before the same judge who is by statute and by local rule vested with the exclusive jurisdiction of the proceeding and who refused to try the jurisdictional issue raised by the Debtor's denials. (Cf. *Page* v. *Wright*, 116 F. 2d 449, 454.)

Moreover, if the decision of a motion in a proceeding, *any* motion, can foreclose an inquiry as to the actual existence of those facts which are averred in the petition to support jurisdiction of the subject matter, then F.R.C.P. Rule 12(h) and the statute (Bankruptcy Act § 143) requiring dismissal where jurisdiction of the subject matter is absent, will stand nullified.

The petitioning creditors further say (opposing brief, p. 6):

> "An involuntary petition under Chapter X must allege an act of bankruptcy. But the debtor can relieve the petitioning creditors of the burden of proving the alleged act of bankruptcy by filing an answer which embodies the substance of a voluntary petition."[2]

[2] The respondents say that "Such an answer is itself an act of bankruptcy under Section 3a(6).

> "* * * the act of bankruptcy, *to form the basis for jurisdiction* must have been committed within four months *previous* to the filing of the petition" (*In re Rialto Properties Co.*, 8 F. Supp. 57).

But the petitioning creditors cannot be relieved of proving t he facts on which jurisdiction depends when the allegations of those jurisdictional facts stand specifically denied. This is precisely what the Supreme Court said in *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178, 189:

> "The authority which the statute vests in the Court to enforce the limitations of its jurisdiction precludes the idea that jurisdiction may be maintained by mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure. If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof."

There can be no more "appropriate manner" of challenging allegations of jurisdictional facts than by specific denials in a pleading.

It remains the incontrovertable fact that the actual existence of jurisdictional facts was at issue when the Court approved the petition and that the issue was never resolved. The judge could not approve the petition if those acts of bankruptcy did not in fact exist (§ 131).

> "A Court does not have the power by judicial fiat, to extend its jurisdiction over matters beyond the scope of the authority granted by its creators." (*Stoll* v. *Gottlieb*, 306 U. S. 165, 171.)

It is said that the time to appeal from the order denying the motion to dismiss for lack of jurisdiction has long since expired and it is now too late to raise the question.

It is never too late to raise the question of federal jurisdiction—it may be raised at any time, at trial or appellate stage. The question, as we have seen, is ever present and self-asserting and needs no stimulus from the debtor to require resolution by the court.

Finally, the respondents lean heavily on § 149. But we have seen from page 29 of the petition for certiorari that the constitutional and statutory limitation upon federal jurisdiction requiring that "any time" the question of federal jurisdiction appears, all proceedings on the merits must stop until the question is determined, is so in conflict with the construction which the courts below placed on Sec. 149 as to present a question which has not been but ought to be settled by this court.

CONCLUSION

There has been no showing that federal jurisdiction affirmatively appears in the record. This is fatal to the judgment below. Certiorari should therefore be granted.

Respectfully submitted,

JULIUS HALLHEIMER,
LOUIS A. VALENTE,
Counsel for Petitioner.

LOUIS A. VALENTE,
JULIUS HALLHEIMER,
OTIS MARK WATERS,
STANLEY NITZBURG,
of Counsel.

Dated, June 5, 1956.